STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 12, 2013
v	No. 312382 Berrien Circuit Court
JOSE OVIDIO ESCOBAR, Defendant-Appellant.	LC No. 2012-000626-FC

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his conviction after a jury trial for possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(*i*). The trial court sentenced defendant to 144 to 480 months' imprisonment with credit for 174 days of time served. We affirm.

Defendant was stopped for a traffic violation while traveling on eastbound I-94 near the six-mile marker in Berrien County. The trooper who made the stop noticed that defendant's vehicle smelled strongly of air fresheners and that defendant exhibited nervous behavior. The trooper asked defendant if he would consent to a search of the vehicle. Defendant consented to the search and troopers found three "kilo-sized" packages of cocaine hidden in the sleeves of a jacket in the rear of the vehicle. The total weight of the cocaine was 2,974 grams.

With regard to the first issue raised on appeal, during sentencing and in the Presentence Investigation Report (PSIR), defendant asserted that he is a Honduran citizen and that he possessed a green card. The prosecutor made the following statements during the sentencing hearing with regard to how defendant's Honduran citizenship may alter his sentence:

> I don't ultimately know what immigration will do with Mr. Escobar, but last—either late last year or early this year, the Michigan Legislature passed a new act which provides that after—I believe it's a third of your sentence, if you are in a Michigan prison subject to a deportation order after you've served—I believe it's a third, it might be a quarter—but a third of your sentence, you will be removed from prison and deported back to whatever country from which you emanate. So it's—it's the one exception to Michigan's Truth in Sentencing Act, so assume for a minute you imposed a ten year sentence, then he would only have to serve roughly a third of that before he would be deported. So I just wanted to

> remind the court of that and leave the matter of sentence to your Honor's discretion. You sat through the trial as long as we did. You certainly have a handle on what happened and what the defendant's involvement is, but I just wanted the court to be aware that there's a possibility that a ten, 12 year sentence wouldn't actually be the sentence served by this defendant.

The trial court thereafter sentenced defendant to 144 to 480 months' imprisonment, stating:

> This is a very serious offense. You had three kilos of cocaine in the vehicle that you were driving from Michigan into Indiana and then back again.
>
> * * *
>
> You do not have a significant prior criminal history. But the guideline range, as you indicate, in this case is very high. The guideline range is 126 months to 210 months on the minimum end. The prior record variable is two.
>
> The purpose of my sentence, sir, is punishment, protection of the community, deterrence, [and] reformation . . . .

Defendant argues that the prosecutor incorrectly informed the trial court that he would only have to serve one-third or one-fourth of his sentence before being subject to deportation, when MCL 791.234b(2)(c) states that defendant must serve "at least ½ of the minimum sentence imposed by the court." Because this error went uncorrected, and may have influenced the decision of the trial court, defendant asserts that resentencing is warranted. We disagree.

"Whether the trial court's understanding was a misapprehension of the law is a question of law, to which we apply a de novo standard of review." *People v Moore*, 468 Mich 573, 579; 664 NW2d 700 (2003). "A sentencing judge's misapprehension of the law can be a ground for finding a sentence to be invalid." *Id*. Nevertheless, the trial court is presumed to know the law. *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001).

We agree with defendant that the prosecutor misstated the contents of MCL 791.234b. MCL 791.234b states, in pertinent part that "the parole board shall place a prisoner described in subsection (2) on parole and release that prisoner to the custody and control of the United States immigration and customs enforcement for the sole purpose of deportation."

> (2) Only prisoners who meet all of the following conditions are eligible for parole under this section:
>
> (a) A final order of deportation has been issued against the prisoner by the United States immigration and naturalization service.
>
> (b) *The prisoner has served at least ½ of the minimum sentence imposed by the court.* [Emphasis added.]

However, we emphasize that the trial court is presumed to know the law, *Knapp*, 244 Mich App at 389, and the prosecutor's misapprehension is not imputed to the trial court. There

is no evidence of record that the trial court considered MCL 791.234b, whether accurately or under a misunderstanding, in sentencing defendant. The trial court noted that defendant's offense was "very serious" and that the purpose of its sentence was punishment, protection of the community, deterrence, and reformation. Thus, there was no indication in the trial court's remarks that it considered the misapprehension of the law put forth by the prosecutor—that defendant might "possibly" serve one-third or one-fourth of the sentence given by the trial court—when determining defendant's sentence. To presume the trial court misunderstood the law and was influenced by such a misunderstanding is purely speculative. The trial court followed the recommendation of the PSIR and sentenced defendant near the low end of the guideline range, properly stating the reasons for the given sentence. Accordingly, defendant is not entitled to resentencing. *Moore*, 468 Mich at 579.

Next, defendant challenges the scoring of OV 15, which the trial court scored at 100 points. Defendant asserts that OV 15 should not be scored where it addresses an inherent characteristic of the underlying offense because this is contrary to the policy behind the sentencing guidelines. We disagree.

The interpretation and application of the statutory sentencing guidelines are legal questions, and, as such, are subject to de novo review. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). "Our goal in construing a statute is to ascertain and give effect to the intent of the Legislature." *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008) (quotation omitted). "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *Id.*

Points are assessed under OV 15 for aggravated controlled substances offenses. MCL 777.45(1). Specifically, MCL 777.45(1) states in pertinent part that OV 15 is scored "by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:"

> (a) The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 1,000 or more grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(*iv*) [100 points]

Here, it is undisputed that defendant's conviction under MCL 333.7401(2)(a)(*i*) involved possession with intent to deliver 1,000 or more grams of cocaine. Further, cocaine is listed as a "schedule 2" controlled substance under MCL 333.7214(a)(*iv*). Therefore, considering the plain language of the statute, a score of 100 points under OV 15 is appropriate.

With regard to defendant's argument that this result is against the policy behind the legislative guidelines because it assesses points for factors inherent in the sentencing offense itself, not aggravating factors, we note that Michigan Courts have already rejected this argument with regard to OV 3 and OV 19. *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005); *People v Underwood*, 278 Mich App 334, 339-340; 750 NW2d 612 (2008). Specifically, in *Houston*, 473 Mich at 409, the Michigan Supreme Court stated that this was an "odd and unpersuasive argument. We consistently look to and enforce the plain language of statutes rather than some imagined 'legislative purpose' supposedly lurking behind that language."

> Moreover, the Legislature has in this very statute demonstrated its ability to preclude the scoring of points for circumstances that are a necessary element of the sentencing offense. For instance, MCL 777.33(2)(b) precludes the scoring of one hundred points where death is an element of the sentencing offense. In addition, MCL 777.33(2)(d) precludes the scoring of five points where bodily injury is an element of the sentencing offense. [*Id*. at 410]

Accordingly, here, if the legislature had intended to "preclude the scoring of points for circumstances that are a necessary element of the sentencing offense," *id.*, under OV 15, it would have done so. Thus, defendant's argument is without merit. Defendant's sentence of 144 to 480 months was within the recommended minimum range under the legislative guidelines; therefore, defendant is not entitled to resentencing. MCL 777.62; *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010).

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens